Supreme Court, U.S.
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No. 00-1632

In The

Supreme Court of the United States

GEORGE JERCICH,

Petitioner,

v.

JAMES PETRALIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals In And For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner George Jercich had a pattern and practice of using nonpayment of wages to abuse his employees. As part of this pattern and practice, Petitioner caused harm to an employee, Respondent James Petralia, by intentionally not paying Mr. Petralia his wages, bonuses, and vacation pay, while loaning Respondent money at usurious rates. This reprehensible behavior was found to be intentionally tortious conduct by two different California courts and the Ninth Circuit Court of Appeals. Did the Court of Appeals err in finding that Petitioner had engaged in "willful and malicious conduct" which is nondischargeable under section 523(a)(6) of the Bankruptcy Code?

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OPINIONS BELOW

James Petralia v. George Jercich, Inc., et al., Unpublished Opinion, Sixth District Court of Appeals, State of California, filed May 22, 1986, reprinted in Respondent's Appendix. (Resp.App. 1)[1]

I. STATEMENT OF THE CASE

The Petition suggests that this case presents the question of whether liability for breach of an employment contract for failure to pay wages is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(6). (Pet. 2) Petitioner asserts that the floodgates of litigation will be opened and the wage priority provisions of 11 U.S.C. § 507(a)(3) rendered a nullity if the Ninth Circuit decision stands. (Pet. 12) According to Petitioner, this case involves an issue of national importance as it will "affect virtually every employer that files for bankruptcy in this nation." (Pet. 14)

However, the Ninth Circuit opinion does not hold what Petitioner claims it does. The Ninth Circuit's decision regarding non-dischargeability followed a final California state court judgment, affirmed on appeal by the California Fourth District Court of Appeal, which found that Petitioner's actions in not paying wages to Respondent were part of an ongoing pattern and practice by Petitioner of delaying and evading his obligations to his

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[1] As there is an appendix attached to Respondent's brief, for convenience Petitioner's appendix shall be referred to as "Pet.App.", while Respondent's appendix shall be referred to as "Resp.App."

employees, resulting in a finding that Petitioner had committed an intentional tort under state law, not merely a knowing breach of contract. (Pet.App. 3)

Unique factual issues are present in this case, as the case is based upon a 17 year old state court decision which, according to Petitioner, would be decided differently today as California law has changed in this area. The unusual factual setting renders unnecessary additional review by this Court.

II. STATEMENT OF THE FACTS

Respondent Jim Petralia was an employee of Petitioner George Jercich. The facts found by the California courts were that Petitioner consistently and intentionally failed to pay Respondent his wages, in a setting where Petitioner had a long history of belated payment of wages, which sometimes were paid as much as 5 months late. (Resp.App. 6) At the same time, Petitioner used the opportunity to loan money to Respondent at usurious rates (20%). (Pet.App. 30)

Petitioner refused to pay Respondent his vacation pay upon termination of employment. When another employee resigned and asked for the vacation pay due him, Petitioner told him to "shine it," meaning that he was not going to pay it. Petitioner characterized this as an "agreement" that "there would be no vacation pay." (Resp.App. 7) The trial court found that Petitioner never made any attempt to pay Respondent's vacation pay. (Pet.App. 28)

Respondent's requests for payment of his wages were either ignored or stalled, or paid when Petitioner "got around to it." During the period of time that Petitioner chose not to pay Respondent's wages, Petitioner had the "clear ability" to pay the wages, but chose not to. (Resp.App. 7)

During this time, Petitioner paid himself bonuses of between $70,000 and $140,000, and made additional payments to a fictional entity consisting of Petitioner and his wife, to other business concerns owned by Petitioner, and to personal creditors of himself and his wife. Beneficiaries of these payments included a horse ranch and Petitioner's parents. (Resp.App. 7)

In concluding that Petitioner had committed the intentional tort of breach of the covenant of good faith and fair dealing, the trial court determined that the behavior of Petitioner constituted "oppression" within the meaning of Civil Code § 3294[2], noting that:

> "Few, if any, areas of the law are more important than an employer's obligation to pay his employee's wages. California courts agree, and have time and again underscored the significance of an employer's failure to pay wages." [citations omitted] (Pet.App. 29)

In California, a finding of "oppression" is a factual finding that Petitioner committed "despicable conduct

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[2] California Civil Code § 3294(a) provides for imposition of punitive damages only "[i]n an action for the breach of an obligation not arising from contract where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice [.]" (Cal. Civil Code § 3294(a))

that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Cal. Civil Code § 3294(c)(2))

On appeal, the California appellate court affirmed the decision of the trial court in every respect, and held that there was ample evidence to conclude not only that Petitioner intentionally failed to pay wages due, but also that Petitioner did not believe in good faith that he was entitled to withhold them, characterizing Petitioner's conduct as part of an ongoing pattern and practice of delaying and evading his obligations to his employees. (Resp.App. 7) As the California appellate court noted:

> "The trial court was entitled to conclude that Jercich's withholding of Petralia's wages had nothing to do with any belief by Jercich in his entitlement to do so, but was instead *part of an ongoing pattern and practice of delaying and evading his obligations to his employees.* The evidence here went well beyond the showing necessary to support waiting time penalties under Labor Code section 203. Assuming that a defense of "good faith" may in a proper case be allowed, the trial court acted well within its province as finder of fact in rejecting such a defense here." (emphasis supplied) (Resp.App. 7-8)

III. REASONS FOR DENYING CERTIORARI

A. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION

The decision below did not decide the question which Petitioner proffers as ripe for decision by this

Court. While Petitioner describes the issue as whether liability for breach of an employment contract by failing to pay an employee wages is nondischargeable under 11 U.S.C. § 523(a)(6), Petitioner's statement of the question ignores the fact that the Ninth Circuit specifically held that a knowing breach of an employment contract, without more, would not satisfy the requirements for nondischargeability under section 523(a)(6). (Pet.App. 7) Instead, the Ninth Circuit went on to hold that, where conduct which would constitute a breach of contract is concerned, in order to be found nondischargeable the conduct must also constitute a wilful and malicious tort. (Pet.App. 7)

The case below involved two basic questions: (1) whether the Bankruptcy Appellate Panel of the Ninth Circuit erred in announcing a new test for nondischargeability conduct under 11 U.S.C. § 523(a)(6) by adding a requirement, not found in the statute, that the conduct involved must be "tortious even if a contract between the parties did not exist" (Pet.App. 5, n.10); and (2) whether Petitioner's conduct, as found by the state court judgment, was tortious conduct which involved a "willful and malicious injury." (Pet.App. 11-15)

The Ninth Circuit first determined that neither the language nor the policies of section 523(a)(6) supported the additional requirement urged by the BAP. (Pet.App. 6-8)

The Ninth Circuit went on to hold that where the conduct in question involves a breach of contract, in order to be found nondischargeable the conduct must also involve "tortious conduct" that gives rise to "willful

and malicious injury." (Pet.App. 7) In the opinion of the Ninth Circuit, the state court determination that the debtor had committed an intentional tort, which, under state law, is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights" was sufficient to determine that the Petitioner's conduct was tortious. (Pet.App. 10) Going further, the Ninth Circuit determined that the "willful" requirement was met by the findings in the state court judgment (Pet.App. 13), and that "malicious" injury was demonstrated by the state court's holding that Petitioner's conduct constituted "substantial oppression" under California Civil Code § 3294. (Pet.App. 14-15)

Although Petitioner asserts that the Ninth Circuit's holding was actually premised upon a decision regarding whether, under California law, the willful failure to pay wages in these particular circumstances was a violation of a fundamental public policy and thus constituted a tort (Pet. 5), Petitioner ignores the fact that both California courts, the trial court and the appellate court, already determined that an intentional tort had occurred. (Pet.App. 30) Petitioner was found to have tortiously breached the covenant of good faith and fair dealing (Pet. 3), which under California law at the time (1984) was deemed to constitute a tort. (Pet.App. 8, n.17)

The Ninth Circuit's opinion is much less complex and far-reaching than Petitioner suggests. In fact, the Ninth Circuit did not independently and improperly determine whether a tort was involved; it simply found that an intentional tort had occurred under state law, which indeed was the conclusion reached by both California

courts which had considered the issue. The Ninth Circuit's recognition that an intentional tort had occurred under state law is not remarkable in nondischargeability jurisprudence and does not merit review by this Court.

B. THE FLOODGATES OF LITIGATION WILL NOT BE OPENED BY THE NINTH CIRCUIT'S OPINION

Petitioner posits a parade of horribles which would supposedly occur if the Ninth Circuit's opinion is not reviewed and reversed, arguing that the floodgates of litigation will open and federal bankruptcy courts will be inundated as hordes of unpaid employees file non-dischargeability cases with every bankrupt employer. (Pet. 7) Petitioner then goes on to suggest that the wage claim priority provisions of 11 U.S.C. § 507(a)(3) will be "rendered a nullity", if the Ninth Circuit's decision is not reversed.

Petitioner's argument is fundamentally flawed, as it ignores the fact that in order to be found nondischargeable the employer's conduct will have to rise to the level of an intentional tort, committed "maliciously" and "wilfully", which will be a very heavy burden in the usual case. An employee must prove substantially more than the fact that the employer knowingly did not pay wages when due. If, and only if, an employee can prove that the employer has stepped over the line and has engaged in intentionally tortious behavior, *e.g.*, using nonpayment of wages as a bludgeon to oppress his employees while lending them money at usurious rates, will the conduct be deemed nondischargeable.

It is likely that this standard will be satisfied in very few cases. It bears noting that as no attorney's fee awards are possible in section 523(a)(6) cases, no external systemic incentives exist to encourage such litigation. As a practical matter, these cases will only be brought where the employer's conduct is so egregious that it rises to the level of an intentional tort under state law, and, even then, will only be brought where the amount of the unpaid wages is sufficient to justify the litigation. It is submitted that the combination of these circumstances occurring will be rare.

As an example, under Petitioner's analysis, if the case at bar were being decided today, given the present state of California law (in Petitioner's view[3]), Petitioner's conduct would not constitute a tort. Assuming Petitioner's conceptual construct, this case would not be successful today, either in California state court or in bankruptcy court. Thus, Petitioner's proffered vision of uncontrollable bankruptcy litigation is conceptually flawed, as measured against the facts of this very case.

For the same reasons, Petitioner's asserted claims regarding the effect on 11 U.S.C. § 507(a)(3) are flawed. Section 507(a)(3) provides for a priority for certain wage claims earned within 90 days of filing the bankruptcy petition, but only to the extent of $4,300. (11 U.S.C. § 507(a)(3)) Petitioner argues that, if wage claims which also involve intentionally tortious behavior by the employer are exempted from discharge, the provisions of section 507(a)(3) will be rendered a nullity.

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[3] As discussed, *infra*, at III, C.

This argument contains no more logic than a setting where an employer has intentionally defrauded an employee into entering into a fraudulent employment contract. Notwithstanding the availability of section 507(a)(3)'s priority wage claim provisions, there is no reason to believe that the defrauded employee would not be able to pursue an adversary proceeding to determine nondischargeability under 11 U.S.C. § 523(a)(2)(A). The availability of nondischargeability treatment for fraudulent employment contracts has hardly resulted in rendering section 507(a)(3) priority wage claims a nullity, any more than does the availability of nondischargeability treatment for situations in which an employer has behaved in an intentionally tortious manner towards his employee by using unpaid wages as a mechanism for abusing the employee. Whether certain limited unpaid wages are accorded priority under section 507(a)(3) has no apparent logical relationship to nondischargeability under section 523(a)(6).

C. REVIEW OF THIS CASE WOULD BE IMPROVIDENT BECAUSE THE CASE IS BASED UPON UNUSUAL FACTS WHICH ARE UNLIKELY TO BE REPEATED AND, ACCORDING TO PETITIONER, THE UNDERLYING LAW IS NO LONGER IN EFFECT

This case is based upon unusual facts which should not serve as the basis for a decision by this Court. The California state court determination that Petitioner committed an intentional tort occurred 17 years ago (1984). (Pet.App. 32) The state court judgment became final

when it was affirmed on appeal 15 years ago (1986). (Resp.App. 1)

As Petitioner notes, in 1988 the California Supreme Court decided a major employment law case, *Foley v. Interactive Data Corporation*, 47 Cal.3d 654, 696 (1988), but *Foley* was decided long after the state court judgment in this case was final. *Foley* was a wrongful termination case, not a wage violation case. Nevertheless, Petitioner broadly asserts that the holding in *Foley* "abrogated the availability of punitive damages in the employment setting." (Pet. 4) Respondent believes that Petitioner's view of *Foley* is overly expansive, as the California Supreme Court noted in *Foley* that violations of public policy, such as occurred in the case at bar, may still be considered torts under California law. (*Foley, supra*, 47 Cal.3d 654, 693, n.30)

Petitioner notes that *Foley* was made retroactive to cases then pending. (Pet. 4) However, the import of Petitioner's statement is unclear, as, notwithstanding such retroactivity, Petitioner apparently does not suggest that *Foley*'s holding would apply to reverse judgments, such as this case, which became final long before *Foley* was decided.

In the case below, the Ninth Circuit found that Petitioner's reprehensible conduct was an intentional tort under California law. (Pet.App. 8-10) Respondent concurs with the Ninth Circuit's reasoning, but also points out that the Ninth Circuit's reasoning was unnecessary to its decision. Both the California trial court and the California appellate court determined that Petitioner had committed an intentional tort under California law. (Pet.App. 30)

The California judgment became final in 1986. The collateral estoppel and full faith and credit doctrines enunciated by this Court in *Grogan v. Garner*, 498 U.S. 279, 284-85, n.11, 111 S.Ct. 654, 658, n.11, 112 L.Ed.2d 755 (1991), would, in any case, prevent re-examination of the conclusions reached by the California courts which were embodied in a final, non-appealable, state court judgment (now 15 years old).

Petitioner's argument that this case would be decided differently today in post *Foley* California does not provide a basis for review by this Court, but instead, if true, merely demonstrates that the factual underpinnings to this case are outdated. Given this unique factual setting, this case does not clearly or directly present any significant issue regarding nondischargeability under section 523(a)(6), nor is it a case of national importance, as the state law in this area, according to Petitioner, has substantially changed since the underlying state court case was decided.

D. THE NINTH CIRCUIT'S OPINION BELOW IS CONSISTENT WITH THIS COURT'S OPINION IN *KAWAAUHAU V. GEIGER*

Petitioner suggests that the opinion below is a departure from this Court's reasoning in *Kawaauhau v. Geiger*, 523 U.S. 57, 188 S.Ct. 974, 140 L.Ed.2d 90 (1998). (Pet. 8-9) However, the opinion by the Ninth Circuit is wholly consistent with the teachings of *Geiger*.

Geiger, a medical malpractice case, distinguished in nondischargeability cases between negligent or reckless

torts (dischargeable) and intentional torts (nondischargeable). (*Kawaauhau v. Geiger, supra,* 523 U.S. 57, 61-62, 118 S.Ct. 974, 977) While Petitioner asserts that this case is an unwarranted incursion into the *Geiger* doctrine, in fact just the opposite is the case.

The behavior of Petitioner in using nonpayment of employee wages with the intent to "oppress" his employee, which was part of a pattern and practice by Petitioner of delaying and evading his obligations to his employees, constituted behavior which was so egregious and so at odds with fundamental California public policy that Petitioner was found to have committed an intentional tort under California law. That finding is entirely consistent with *Geiger's* requirement that nondischargeability treatment under section 523(a)(6) be limited to intentional torts.

Unless this Court wishes to involve the bankruptcy courts in defining anew the field of intentional torts, a task that has already been amply performed by existing state decisional and statutory laws, no need exists for review of the opinion below. Even if the Court wished to further explore this subject, this particular case, with its unusual and arguably outdated factual setting, would prove an inappropriate vehicle for doing so.

IV. CONCLUSION

For all of the above reasons, Mr. Jercich's petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JAMES PETRALIA,

Plaintiff, Cross-defendant and Respondent,

v.

GEORGE JERCICH, INC., et al., Defendants, Cross-complainants and Appellants.

From August 1980 until January 1983 plaintiff Petralia was employed as an account executive in the loan brokerage business owned and operated by defendants George Jercich, Inc., and George Jercich.[1] He quit that employment on January 10, 1983. On February 28, 1983, he filed a complaint against defendants for wages alleged to be due and unpaid. As amended, the complaint charged Jercich with failing to pay wages in breach of the employment contract; usurious lending in violation of article XV, section 1 of the California Constitution; and breach of the covenant of good faith and fair dealing through this and other conduct allegedly in violation of Jercich's obligations as an employer. Plaintiff sought

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[1] The parties have made no material distinction between the two defendants for purposes of this appeal. By stipulation, any judgment against the corporation is binding on both defendants. Accordingly references here to "Jercich" may be taken to include both defendants.

recovery of unpaid wages, "waiting time" penalties under Labor Code section 203, prejudgment interest, punitive damages under Civil Code section 3294, treble damages on the usury cause of action, and attorney fees.

Defendants denied liability and defendant George Jercich, Inc., cross-complained, alleging that Petralia was soliciting former clients in violation of the employment agreement, that he had breached an agreement to indemnify defendants in connection with certain property in Ben Lomond, California, and that he had breached a separate agreement to pay certain "carrying costs" in exchange for the right to occupy certain property in Carmel Valley, California.

The parties indicate that the claim for solicitation of former clients was settled; in any event it was not in issue at trial and is not in issue here. As presented at trial and on this appeal, the cross-action consisted of two interrelated claims, namely that Petralia was obligated to pay "carrying costs" for the time he occupied the Carmel Valley property and that he was liable for failure to purchase that property as he had allegedly promised to do.[2]

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[2] The record contains no formal pleading by Jercich of a binding contract for purchase of the Carmel Valley property, or of any breach of such a contract. The cross-complaint alleged only as "occupancy agreement" and referred to a statement by Petralia that "he desired to purchase said [Carmel Valley] property and . . . would attempt to secure a loan for the purchase thereof . . . " The allegations of a purchase agreement were, however, in issue at trial, and we therefore accept them as properly before us.

The matter was tried to the court sitting without a jury, and resulted in a judgment wholly favorable to Petralia on both his complaint and the cross-complaint. This appeal is timely, having been filed within thirty days of the denial by operation of law of defendants' motion for new trial. (Cal. Rules of Court, rule 3(a); Code Civ. Pro., § 660.)

Jercich contends that the trial court erred in awarding "waiting time" penalties, punitive damages, and attorney fees. With respect to the cross-action, Jercich contends that it was error not to enforce the alleged agreements for the occupancy and purchase of the Carmel Valley property.

Many of defendants' arguments rest on the supposed insufficiency of the evidence to support the trial court's findings. Having reviewed the record we are satisfied that ample evidence exists to support each of the questioned findings. Defendants' contentions are little more than a reargument of the evidence and an invitation for us to substitute our interpretation for that of the trial judge. This invitation overlooks our proper function, which is to decide issues of law. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 241, pp. 246-247.) In any case, the present record is replete with evidence in support of the trial court's findings and any argument predicated on alleged error in that regard is futile.

I
AMPLE EVIDENCE SUPPORTED THE AWARD OF "WAITING TIME" PENALTIES UNDER LABOR CODE SECTION 203

Jercich first contends that the trial court erred by awarding "waiting time" penalties under Labor Code section 203. He asserts that he believed he had the right under the "oral occupancy agreement" alleged in the cross-complaint to set off Petralia's commissions against the "carrying costs" on the Carmel Valley property, and that therefore his failing to pay Petralia was not willful and not a violation of section 203. This argument is without merit.

Labor Code section 202 provides that wages are due seventy-two hours after an employee gives notice that he is quitting his employment. Section 203 provides that if an employer "willfully" fails to pay any wages due a discharged or quitting employee, the wages "shall continue . . . from the due date thereof at the same rate until paid or until an action therefore is commenced; but such wages shall not continue for more than 30 days." The purpose of the section is "to compel the prompt payment of earned wages" (*Barnhill* v. *Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 7) and thus "to protect the employee and to promote the welfare of the community" (id., quoting *Manford* v. *Singh* (1919) 40 Cal.App. 700, 702-703).

In *Barnhill, supra,* an employer had withheld wages in the mistaken belief that it was entitled to do so under principles of setoff. The court held that the employer was not subject to the waiting time penalty of section 203 because his conduct did not appear to have been "willful" within the meaning of the statute. Jercich relies on

that holding in arguing that his own conduct here was not such as to justify assessment of a waiting time penalty. In *Barnhill*, however, it was not contended that the employer had acted otherwise than in good faith in claiming a setoff against the employee's wages. (Id. at p. 8.) The law with respect to such setoffs was uncertain. (*Ibid.*) Apparently, there was no dispute about the employer's belief that it was entitled to withhold the wages. (*Ibid.*)

In contrast to *Barnhill*, the present case includes an express finding by the trial court of a willful refusal to pay wages. That finding is supported by substantial evidence.

In the first place, it is evident that Jercich in fact had no right to unilaterally set off an employee's debt against wages owed to that employee. The *Barnhill* court explicitly held that "an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Id.* at p. 6.)[3] Accordingly Jercich's position comes down to a contention that his withholding of Petralia's wages was not willful because he believed he had a valid claim against Petralia as well as the legal right to set that claim off against Petralia's wages.

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[3] Nor would Jercich's withholding of all of Petralia's wages be any less objectionable if there existed, as Jercich contends, an agreement to offset Petralia's commissions against carrying costs on the Carmel Valley property. Assuming such an agreement could excuse withholding the *commissions* Petralia had earned, it would not justify Jercich's refusal to pay the vacation pay and flat salary for January which were also due and unpaid.

The willfulness required for imposition of a waiting time penalty under Labor Code section 203 need not consist of "a deliberate evil purpose to defraud workmen of wages which the employer knows to be due." (*Barnhill, supra,* at p. 7.) "As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act *which was required to be done.*" (Id. at 7, citing Davis v. Morris (1940) 37 Cal, App. 2d 269, 274, original emphasis.)

Here, the evidence supports a finding not only that Jercich intentionally failed to pay wages due, but also that Jercich did not believe in good faith that he was entitled to withhold them. Petralia testified that Jercich acknowledged the debt and promised to attempt to make at least a partial payment, on the day Petralia announced he was quitting. Moreover, Jercich had a long history of belated payment of Petralia's wages. Throughout the period of Petralia's employment Jercich knew that commissions constitute wages, yet Petralia's commissions were paid as much as five months late. A current employee of Jercich testified that during the relevant period payments were late about three-quarters of the time. Petralia said that collecting commissions " seemed to be a problem every time." His requests for payment were either ignored or stalled, and he was paid "whenever they got around to it."

Jercich's own testimony was that commissions were paid when there was "cash available" for that purpose. However during most of Petralia's employment Jercich was paying himself a salary of $6,250 per month. And although his salary was supposedly "suspended" during the period when Petralia earned most of the commissions

at issue here, Jercich paid himself a "bonus" for that period of either $70,000 or $140, 000. Additional payments were made to a fictional entity consisting of Jercich and his wife, to other business concerns owned by Jercich, and to personal creditors of himself and his wife. Beneficiaries of these payments included a horse ranch and Jercich's parents.

Jercich testified that it was a company policy to pay employees for accrued vacation upon termination of employment. Yet when another employee resigned and asked for the vacation pay due him, Jercich told him to "shine it," meaning that he was not going to pay it. Jercich characterized this as an "agreement" that "there would be no vacation pay." He did not testify that he reached any similar agreement concerning vacation pay with Petralia. Instead he said that he "refused to pay [Petralia] one penny for anything until I determined whether or not I owed him any money, or if he, in fact, owed us money."

The trial court was entitled to conclude that Jercich's withholding of Petralia's wages had nothing to do with any belief by Jercich in his entitlement to do so, but was instead part of an ongoing pattern and practice of delaying and evading his obligations to his employees. The evidence here went well beyond the showing necessary to support waiting time penalties under Labor Code section 203. Assuming that a defense of "good faith" may in a proper case be allowed, the trial court acted well within

its province as finder of fact in rejecting such a defense here.[4]

II.

THE AWARD OF BONUS COMMISSIONS WAS SUPPORTED BY SUFFICIENT EVIDENCE

Jercich next argues that the trial court erred in awarding "bonus commissions." It is undisputed that such commissions were called for under the written employment agreement of June 16, 1982. Jercich contends, however, that he reserved the absolute power to adjust Petralia's salary or commission schedule, and that he "cancelled" the bonus program in an exercise of this power. He testified that he did this by telling the account executives that the provision in question "was not going to be enforced."

Plaintiff recalled no effort by defendant to declare the bonus program suspended and understood it to remain in effect throughout the latter months of his employment. Another former employee of defendants testified that he was never told the plan was suspended or cancelled. Yet another employee, who was still employed by defendants, testified that Jercich made no statement to him that the bonus program was cancelled. Jercich himself volunteered the testimony that he was unable to find evidence to support the cancellation.

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[4] Unlike the employer in *Barnhill, supra*, Jercich cannot point to any legal uncertainty about his right to exercise setoff, because *Barnhill* itself had resolved that question adversely to his position some fifteen months before the instant dispute arose.

The trial court was entitled to find that the program remained in effect.

Jercich also contends that Petralia's failure to include the bonus commissions in his original demand for wages somehow precluded their being awarded in the judgment. No authority is cited for this proposition. It is offered as nothing more than a factual contention which the trial court was free to reject.

The finding that Petralia was entitled to an award of bonus commissions will not be disturbed.

III

THE TRIAL COURT DID NOT ERR IN AWARDING PUNITIVE DAMAGES UNDER CIVIL CODE SECTION 3294

The trial court awarded $20,000 in punitive damages under Civil Code section 3294. Jercich contends that this was error. The precise basis for this argument is not clear. He emphasizes that punitive damages are only awardable under section 3294 "[i]n an action for breach of an obligation *not arising from contract.*" However he concedes that where an action sounds in tort as well as contract, punitive damages are recoverable. (See 1 Within, Summary of Cal. Law (8th ed. 1973) Contracts, § 644, pp. 548-549)

The complaint contained a count for breach of the covenant of good faith and fair dealing. Such a breach may constitute a tort. (*Egan* v. *Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d. 809, 818; see *Genial Distributing Co.* v. *Beck & Co.* (1985) 172 Calliope.3d 1020, 1035-1036.) Jercich does not argue that this theory was inapplicable to the facts of this case, and we therefore do not decide the

applicability of that theory to a claim for willful failure to pay wages. (See 9 Within, Cal. Procedure (3d ed. 1985) Appeal, § 479, pp. 469-471.) We do observe that the situation presented here more closely resembles the "special relationship" between an insured and a third-party insurer, which supported imposition of tort liability and punitive damages in *Egan, supra,* than it does the relationship of manufacturer and distributor, which was held not to support an implied-in-law covenant in *Genial, supra.*[5]

Jercich's sole argument concerning punitive damages appears to be that the evidence did not support the trial court's finding of "substantial oppression" in Jercich's failure to pay Petralia's wages. Based on the evidence summarized above we are satisfied that this finding is supported by substantial evidence and that the award of punitive damages should be left undisturbed.

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[5] Nor is there before us any contention that the "waiting time" penalties provided by Labor Code section 203 are the exclusive remedy for a refusal to pay wages. While we do not reach that issue, we observe that similar contentions have been rejected in other contexts, at least in the absence of some indication that the Legislature intended the statutory remedy to be exclusive. (See *Commodore Home Systems, Inc.* v. *Superior Court* (1982) 32 Cal.3d 211, 221 [punitive damages available in job discrimination action under Fair Employment and Housing Act]; *Hansel* v. *Singer Co.* (1982) 138 Cal.App,3d 290, 304, 305 [common law remedies not foreclosed by Labor Code provisions governing discharge for complaint about unsafe conditions or by Workers' Compensation Act].)

IV

NO ERROR APPEARS IN THE AWARD OF ATTORNEY'S FEES

The written employment contract between Petralia and Jercich contained a paragraph which, in essence, prohibited Petralia from soliciting Jercich customers after terminating his employment with Jercich. Included in that paragraph is the following sentence: "Provided [Petralia] violates this provision, [Petralia] shall be liable to [Jercich] for punitive and special damages and [Jercich's] court costs and attorney's fees." Both parties prayed for attorney's fees in their respective pleadings. The judgment awarded fees to Petralia.

Jercich contends that the award of attorney's fees was erroneous because the contract provided for such an award only in litigation over the non-competition clause. The cross-complaint contained a claim arising from this clause, but we are advised that it was settled before trial. In any event the record established that the non-competition provision was not in issue at trial.

The fee award appears to be based on Civil Code section 1717, subdivision (a), which provides in relevant part: "Where a contract provides for attorney's fees, such provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract."

The contract involved here contains no reference to legal representation during its negotiation and there is no contention that the parties were in fact represented. Accordingly, if section 1717 applies the attorney's fee

clause in the noncom petition provision shall be construed as applying to the entire contract.

Jercich invites us to hold that section 1717 does not apply because the Legislature did not have contracts such as the present one in mind when, in 1983, it enacted the pertinent amendment to that section. Jercich directs us to no ambiguity or constitutional infirmity in the statute. No argument is made, for example, that the amendment to section 1717 cannot constitutionally be applied to a contract entered before its effective date. In these circumstances we discern no basis for limiting the effect of the statute.

We also reject the suggestion, raised for the first time in Jercich's reply brief, that the parties' settlement of the noncom petition cause of action somehow operated to retroactively bring the employment agreement within the exception to section 1717. We are unable to discern any basis in law or logic for such a contention, particularly since it is unaccompanied by citations to authority.

Defendants have demonstrated no error in the award of attorney's fees.

V

THE TRIAL COURT DID NOT ERR IN REFUSING TO ENFORCE THE AGREEMENTS ALLEGED IN THE CROSS-COMPLAINT

Jercich contends that the trial court was required to find in his favor with respect to the alleged agreements by Petralia to pay "carrying costs" on the Carmel Valley property, and to purchase that property.

The trial court found that Jercich did not prove the existence of a separate agreement for payment of "carrying costs," and that "[i]f there was such an agreement, it was part of the agreement to purchase the house, and thus barred by the Statute of Frauds." The court also resolved in Petralia's favor the evidentiary conflicts which existed in connection with these claims. Thus the court found, at least by implication, that no occupancy agreement existed.

This finding is supported by substantial evidence. Petralia flatly denied entering into such an agreement, and Jercich's own testimony was far from compelling. At trial he asserted that the "occupancy agreement" was a separate transaction from the purchase agreement, but in deposition he had insisted that "it was all rolled up into one verbal agreement." Asked in deposition whether he could offer any reason for not reducing the occupancy agreement to writing, Jercich replied, "Nope."

Similar infirmities attended Jercich's attempt to prove an enforceable agreement for the sale and purchase of the Carmel Valley property. He testified that the deal was reached in September 1982, before Petralia moved into the house; however in a letter dated September 27 he referred to the transaction as "a proposed sale. . . . " He testified at one point that the consideration for Petralia's entry into the deal was that Petralia would be relieved of obligations he supposedly had assumed under another (oral) real estate agreement. Elsewhere, however, Jercich conceded that the Carmel Valley deal was proposed by him as an inducement to keep Petralia from quitting his job. Furthermore Jercich testified unequivocally in deposition that the deal was never reduced to writing and that

the written deposit receipt which Petralia signed was intended solely to permit Petralia to seek a loan. The trial court was entitled to discount Jercich's testimony at trial and to conclude that no enforceable contract was ever entered.

The trial court also found that any performance due from Petralia in connection with the Carmel Valley property was excused by failure of a condition precedent, namely Petralia's obtaining adequate financing. Jercich contends that this finding is unsupported by the evidence and rests on an erroneous understanding of the law affecting contractual conditions. The evidentiary argument rests on the erroneous proposition that the trial court was required to interpret the deposit receipt dated September 20, 1982. This argument fails because the trial court found in effect that the deposit receipt was not a contract and that if the parties had an agreement it was oral. The court's findings (in the alternative) about the terms of the agreement do not depend upon the deposit receipt, and nothing in this record would compel us to overturn those findings.

Jercich argues that the financing "condition" should have been interpreted as a covenant such that Petralia's failure to procure financing or his repudiation of the agreement constituted an actionable breach. However, any error in this regard would be harmless since, as we have already observed, the evidence amply supports the trial court's alternative determinations that there was no contract and that any contract which might have arisen would have been wholly oral and therefore unenforceable. Moreover, as appellant concedes, the trial court's silence on these issues constituted an implied finding that

Petralia did substantially perform all conditions on his part to be performed. (See 9 Within, Cal. Procedure (3d ed. 1985) Appeal, § 268, pp. 276-277.) There was considerable conflict in the evidence as to what Petralia did in connection with financing, and what he was required to do under the alleged agreement. No cause for reversal appears here.

The judgment is affirmed.

Anderson, P.J.

We concur:

Poche, J.

Channell, J.

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